

In the Matter of)
)
Effects of Communications Towers) WT Docket No. 03-187
on Migratory Birds)

To: The Commission

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SUMMARY

American Tower believes that it is important that all tower owners comply with the Commission's environmental regulations and that, to date, the FCC has done a laudable job of balancing the need to be responsive to environmental issues and its Section 1 mandate to make available to everyone "a rapid, efficient, Nation-wide and world-wide wire and radio communication service with adequate facilities at reasonable charges." 47 U.S.C. § 151.

American Tower urges the FCC to continue to maintain the balance between these public interests and avoid the temptation to "do something" to show its concern for migratory birds without regard to whether the record contains peer-reviewed data sufficient to warrant such action.

Indeed, the record here shows that there is significant disagreement among avian researchers as to whether red lights are an attractant to migratory birds. Moreover, there is also data in the record that conflicts with the unproven assumption that tower collisions are a significant cause of avian mortality. Given the paucity of peer-reviewed scientific data and the conflicting data that has been gathered to date, any FCC initiative would be arbitrary and capricious and could unintentionally harm migratory birds rather than help them.

What is certain is that many of the proposals contained in the NPRM would, if adopted, adversely affect the ability of public safety licensees and commercial wireless carriers to provide new coverage and services to rural and urban areas while increasing the time it would take to bring new facilities on-line.

"Preferring" white strobes, placing restrictions on guyed towers and the heights of towers, segregating towers into antenna farms and adding another federal agency into the tower siting process will further slow down the tower siting process, at a time when new towers and collocation opportunities are required. Requiring existing towers to be retrofitted with white strobe lighting would inevitably compound the problem.

Further, proposals to require collocation are unnecessary, because tower owners and licensees are highly motivated to collocate due to economics, pressures from local zoning boards, and the 2001 Collocation Agreement.

As a tower owner and operator with over 30,000 sites, American Tower experiences daily the urgency with which both public safety and commercial licensees seek to meet the needs of the public by expanding coverage to areas that are yet unserved or underserved. The tower siting process is already subject to a vast array of local, state and federal rules, regulations and policies designed to protect the environment. Further regulation is not only unwarranted, it would be arbitrary and capricious for the FCC to act, given the current state of the science.

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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To: The Commission

**REPLY COMMENTS OF
AMERICAN TOWER CORPORATION**

American Tower Corporation hereby submits its reply comments in response to the Federal Communications Commission’s (“FCC” or “Commission”) *Notice of Proposed Rulemaking* concerning the effects of communications towers on migratory birds.¹

Formed in 1995, American Tower, a publicly held company, is a leading owner and operator of wireless and broadcast communications sites in North America. Today, the company owns and operates over 30,000 sites, including more than 22,000 owned wireless and broadcast towers and over 10,000 managed rooftop and tower sites — the most diverse site portfolio in the industry. American Tower works closely with communities to ensure that our solutions enable the deployment of advanced wireless services, while complying with the FCC’s environmental regulations.

Given the national scope of American Tower’s portfolio, American Tower deals on a daily basis with local zoning boards, landowners, collocators, State Historic Protection Offices, federally recognized tribes and state and federal agencies on tower siting matters. We are proud

¹ *Effects of Communications Towers on Migratory Birds*, WT Docket 03-187, *Notice of Proposed Rulemaking*, 21 F.C.C.R. 13241 (2006) (*NPRM*). These reply comments are timely filed in accordance with the Commission’s extension of the filing deadline. *See id.*, *Order*, DA 07-72 (Jan. 12, 2007).

of our twin commitments to the environment and to compliance with the FCC's environmental rules. American Tower is sensitive to community needs and works closely with communities and zoning organizations to find locations that provide quality service at a reasonable cost with little or no impact. It designs its towers with collocation in mind and often redevelops and upgrades existing towers to accommodate collocations rather than building new towers.

American Tower is filing these Reply Comments to provide the FCC with its assessment of the potential adverse effects the proposed avian-tower regulations could have on the already significant burdens imposed on tower siting by the FCC regulations. In addition, American Tower concurs in the comments filed by the Infrastructure Coalition, as well as its reply comments being filed today. Those comments and reply comments address in detail the FCC's lack of legal authority to promulgate rules to address avian mortality at towers pursuant to the National Environmental Policy Act ("NEPA") and other laws, contrary to the claims of the advocates of bird protection regulations.² The Infrastructure Coalition also provides a comprehensive analysis of the questionable scientific evidence before the Commission.³

INTRODUCTION

From American Tower's perspective, the FCC is proposing an array of potential "solutions" without any certainty that (a) there is a problem that needs to be solved, and that (b) the proposed solutions will solve the problem, rather than exacerbate it. There have been years of proceedings replete with preliminary and inconclusive scientific papers and consultants' reports, but there's no clear answer to *either* of these questions.

² See Comments of the Infrastructure Coalition (CTIA, NAB, NATE, PCIA, WCA, and MSTV) at 16-42; Reply Comments of the Infrastructure Coalition.

³ See Comments of the Infrastructure Coalition at 5-16, 42-53; Reply Comments of the Infrastructure Coalition.

The only certainty is that *any* of the proposed “solutions” will make it much harder, costlier, and more time-consuming to locate the tower sites needed to extend public safety and commercial services to unserved and underserved parts of the nation, *if a satisfactory site can be found at all*. That outcome would be contrary to the FCC’s core responsibility, which is to see that radio services are made available nationwide for the benefit of the public.

I. THE SCIENTIFIC DATA NECESSARY TO WARRANT AVIAN TOWER REGULATION DOES NOT EXIST, AND THUS REGULATION IS INAPPROPRIATE

The first step is for the FCC to be quite certain there is a problem that needs to be solved. When the FCC makes wide-ranging and costly decisions that are based on science, it needs to establish that there is solid scientific evidence supporting its decision. When the scientific evidence is unclear or contradictory, it would be arbitrary and capricious to proceed to a decision that may impose costs on its regulatees and adversely affect the public. Moreover, the Data Quality Act⁴ and related OMB requirements⁵ hold the FCC to high standards for its consideration of scientific evidence. In particular, scientific evidence having a “substantial impact on important public policies or private sector decisions” must be peer-reviewed.⁶

In this proceeding, it is far from clear that avian mortality from tower collisions is a significant problem. The *NPRM* appears to have been issued at least partly in response to claims that “several instances of mass avian mortality at communications towers . . . represent only the tip of an iceberg”⁷ What the advocates of regulation fail to acknowledge, however, is that these massive bird kill events were isolated incidents over a 50-year period; moreover, the last

⁴ Treasury and General Government Appropriation Act for Fiscal Year 2001, Pub. L. No. 106-554, § 515 Appendix C, 114 Stat. 2763A-153 (2000).

⁵ Office of Management and Budget, *Final Information Quality Bulletin for Peer Review*, 70 Fed. Reg. 2664, 2667, 2675 § II.1 (2005).

⁶ *Id.*

⁷ *NPRM* at ¶ 17 (internal quotation marks and footnote omitted).

such incident occurred *nine years ago*, in 1998.⁸ Isolated incidents that were likely the result of extraordinary weather or migration conditions does not mean that there is a problem that needs to be addressed, much less a reason for adopting new rules and policies that will be applied to all towers nationwide.

The scientific evidence currently before the Commission is inconclusive about the degree of harm that towers pose to migratory birds, whether tall or guyed towers are more harmful to birds than other towers, and whether one or another form of lighting is preferable from the viewpoint of avian mortality. Most of the estimates of avian mortality from towers are based on studies conducted many years ago at only three locations, extrapolated to all towers nationwide with no evidence as to the applicability of the findings from these studies to other locations or tower types.⁹

The Michigan Study by Dr. Gehring¹⁰ is a first step toward scientific analysis of the effects of various types of towers and tower lighting on birds, but that study is too flawed to serve

⁸ See L.A. Neilsen and K.R. Wilson, *Clear Channel of Northern Colorado Slab Canyon KQLF-FM Broadcasting Tower Avian Monitoring Project 2002-2004*, at 2 (Table 1) (Final, Dec. 16, 2006) (“Citicasters Study”), appended as Exhibit I to Comments of Citicasters.

⁹ See Comments of Land Protection Partners (“LPP”) at 2 (summarizing the origin of the FWS estimates of avian mortality due to tower collisions).

¹⁰ See Michigan Lighting Report; J.L. Gehring and P. Kerlinger, *Avian Collisions and Communications Towers: I. The Role of Tower Height and Guy Wires* (2007, Final) (“Michigan Height/Guy Wire Report”).

as a basis for decision,¹¹ it has not yet been peer-reviewed, and it (and its principal author, in her own comments) readily acknowledges the need for further research.¹²

LPP's analysis (which is not peer-reviewed) of the threat posed by towers to specific species is seriously flawed: LPP admits that its "estimates of mortality by species may reflect historical rather than current patterns," owing to its use of data from many earlier studies from different time periods and locations, and that its anomalous results "illustrate the potential complications of extrapolated mortality from historical towerkill data."¹³ As a result, it says its "total mortality estimates must be interpreted with caution."¹⁴ LPP also engages in multiple questionable assumptions and does not disclose many of its methods for analyzing data.

In fact, the only peer-reviewed study that has been submitted into the record in the current comment cycle appears to be the Evans-Manville study published early this year concerning the attraction of birds during heavy cloud conditions to various types of lighting.¹⁵ That study's finding of an "unexpected response to nonflashing red light"¹⁶ appears to contradict the notion

¹¹ The Michigan Study examined only a limited number of locations in a single state, and only a limited subset of tower heights were studied. Many of the locations were in areas with very high populations of migratory birds, which are not typical of tower locations nationwide. The study acknowledged that "tower studies conducted in other geographic settings would be valuable for replication and validation of our results." Michigan Height/Guy Wire Report at 11.

¹² See Comments of J.L. Gehring at 2-5, 7; Michigan Height/Guy Wire Report at 11; Michigan Lighting Report at 13.

¹³ See LPP Report at 14-15 (acknowledging that LPP assumed, contrary to fact, "that the proportion of birds remains constant over time" and that abnormally high numbers of takes are predicted for certain species that have declined in population).

¹⁴ *Id.* at 14.

¹⁵ See W.R. Evans, Y. Akashi, N.S. Altman, and A.M. Manville, *Response of Night-migrating Birds in Cloud to Colored and Flashing Light*, 60 N. Amer. Birds 476-88 (2007) ("Evans-Manville"), submitted as an attachment to the Comments of Old Bird, Inc.

¹⁶ Evans-Manville at 16; see *id.* at 11 ("The calling rate during the flashing red beacon (L-864), the flashing red beacon (L-864) with the constant-on red beacon (L-810), and the flashing white light periods was similar to the dark periods. Figure 4d shows a sequence of four adjacent light cycles, in which the flashing red beacon did not induce aggregation by itself or in combination with a low intensity, non-flashing, red beacon."), 12 (Figure 4d).

that birds are more attracted to solid red lights than to flashing white lights¹⁷ that was found in the Michigan Study¹⁸ and is the premise of the Commission's proposed lighting preference.¹⁹ Obviously, the Commission cannot proceed to adopt its proposed preference when the non-peer-reviewed basis for that preference has been undermined by peer-reviewed research. At a minimum, more research is needed before any reasoned decision can be reached. Just as a swimmer should never dive head first into a creek without first determining the depth of the water, neither should the Commission promulgate regulations before determining whether there is a problem and quantifying the nature and extent of the problem.

The Evans-Manville study contains a sobering lesson — that a well known hypothesis can be wrong. Now that the FCC has the benefit of the Evans-Manville study, it must recognize that white strobe tower lighting may well not be quite the solution that it appeared to be.

Until the state of the science is more settled the FCC can have no confidence that requiring white strobe lighting instead of red lighting will not *increase* bird mortality. Any benefit that happens to result from a decision reached without a solid scientific basis will be entirely fortuitous; the FCC might as well choose its policies by rolling dice. Thus, by basing a “solution” on preliminary data the FCC may unintentionally exacerbate avian mortality.

To the extent the FCC considers non-peer-reviewed research submitted or cited by advocates of regulation, it should also take into account studies by licensees and tower owners of the actual effects of towers on avian mortality. For example, Citicasters submitted a study concerning a tall, guyed tower with solid/flashing lighting. Due to the fact that it is a tall, guyed tower in

¹⁷ See Evans-Manville at 16-17 (“Several studies have reported pronounced avian flight calling in association with apparent bird aggregation at TV towers with red aviation obstruction lighting Our finding appears contrary to some prevailing beliefs that bird kills at tall towers with red aviation obstruction lighting are specifically induced by the red nature of the light.”).

¹⁸ See Michigan Lighting Study at 11-12.

¹⁹ See *NPRM* at ¶ 39.

an area of known bird migration, this is the type of tower that the bird regulation advocates would consider to pose the greatest risk. The Citicasters Study, however, found only eleven birds over a two-year study period.²⁰ In addition, American Tower commissioned a three year avian-tower study, monitoring six short, unguyed, unlighted towers in Arizona during the spring, summer, and fall of 2004, 2005, and 2006; it found a total of one bird in 2004, two in 2005, and none in 2006.²¹ None of these three birds belong to listed endangered or threatened species.²² A copy of the most recent report from the Citicasters Study is included herewith.

Instead of adopting rules, policies, and “preferences” that will impose costs on licensees and tower companies without a valid scientific basis, the FCC should, at a minimum, make clear the need for further research and suggest some of the matters that should be studied. In particular, there needs to be research into the migratory patterns of birds in the United States to determine whether certain areas are of greater concern than others. The technology suitable for doing such research has evolved considerably and has been used in some avian studies,²³ and the time may be approaching when technology such as NEXRAD would permit the conduct of peer-reviewed long-term scientific studies which document large-scale bird migration patterns. It is important that future scientifically controlled studies include a much wider variety of tower sizes and locations, including sites *not* in known migratory bird paths, so that a more accurate picture of avian tower mortality emerges.

²⁰ See Citicasters Study at 20-21.

²¹ C. Derby, *Bird and Bat Fatality Monitoring of Six Un-guyed, Unlit Cellular Telecommunication Towers within the Coconino and Prescott National Forests, Arizona: 2006 Season Results*, at 4-5 (Dec. 16, 2006), attached as an Appendix to these reply comments.

²² The FWS endangered species database at <http://www.fws.gov/endangered/wildlife.html> reports that no entry exists when the scientific names are entered for the three species reported found in the American Tower study.

²³ See Evans-Manville at 2, 16, 20 (discussing technology used in prior studies).

II. THE FCC SHOULD NOT PERMIT THE TOWER INDUSTRY TO BE UNFAIRLY SINGLED OUT FOR DISPROPORTIONATE REGULATION

As a tower owner and operator, American Tower is concerned that the tower industry has been singled out for potential regulation in the interest of reducing avian mortality when towers are far from being one of the most significant man-made sources of harm to birds. The Fish and Wildlife Service's comments make clear that even using the most inflated estimates of avian mortality, communications towers pale by comparison to building windows, vehicles, and power lines as causes of avian mortality.²⁴

American Tower believes that the FCC should not succumb to the temptation to “do something” solely to show its concern for migratory birds, especially when additional regulation of tower siting would conflict with the FCC's core duties — “regulating . . . radio so as to make available, so far as possible, to all the people of the United States, . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges,” promoting “the national defense,” and “promoting safety of life and property through the use of wire and radio communications.”²⁵ Protection of birds is not part of the FCC's mandate; indeed, birds are not mentioned in the Communications Act at all. The FCC's rulemaking authority extends only to rules that are “not inconsistent with” the Communications Act that “may be necessary in the execution of its functions,” or that “may be necessary in the public interest to carry out the provisions” of the Act,” 47 U.S.C. §§ 154(i), 201(a); *accord* 47 U.S.C. § 303(r). With regard to the marking and lighting of towers, the FCC's may adopt such regulations only “if and when in its judgment such towers constitute, or there is a reasonable

²⁴ See Comments of Fish and Wildlife Service, U.S. Department of Interior (“FWS”) at 9-10 (FWS “conservatively” estimates bird collisions with towers at 4-5 million but “perhaps as high as 40-50 million”), 13 (FWS estimates building windows may take 97-980 million, vehicles 60-80 million, and power lines up to 175 million).

²⁵ 47 U.S.C. § 151.

possibility that they may constitute, a menace to air navigation.” 47 U.S.C. § 303(q). *Accordingly, any tower regulations seeking to protect birds must further, and not be inconsistent with, the FCC’s statutory objectives.* As the Utilities Communications Council says, “the deaths of a small percentage of migratory birds must be weighed against the importance of critical communications systems.”²⁶

Rather than treat tower owners as regulatory “targets of opportunity,” American Tower believes the federal government should pursue a unified and reasoned approach to avian mortality related to private sector activities. A unified approach would (a) allow activities to be regulated in proportion to their documented harm to birds and (b) facilitate a comprehensive evaluation of the costs and benefits of regulating different activities, rather than piecemeal regulation of certain lines of business that are, at best, minor sources of avian mortality, simply because they are subject to a federal agency’s jurisdiction.

III. THE FCC SHOULD NOT ADOPT REGULATIONS ADVERSELY AFFECTING COVERAGE, COST, AND PUBLIC SAFETY

The regulations and policies contemplated in this proceeding are inconsistent with the FCC’s statutory mandate. The *NPRM* seeks comment on preferring white strobe lighting over red tower lighting,²⁷ restrictions on the use of guyed towers,²⁸ restrictions on tower height,²⁹ limitations on tower locations,³⁰ collocation requirements,³¹ routinely requiring environmental processing with respect to migratory birds,³² and other possible requirements.³³ *All* of the many

²⁶ Comments of Utilities Communications Council at 3.

²⁷ *NPRM* at ¶¶ 38-47.

²⁸ *Id.* at ¶¶ 48-55.

²⁹ *Id.* at ¶¶ 56-58.

³⁰ *Id.* at ¶ 59.

³¹ *Id.* at ¶ 60.

³² *Id.* at ¶ 61-64.

³³ *Id.* at ¶ 65.

types of regulations under consideration will increase the cost of deploying facilities used to provide service (and thus the charges for service), increase the time it will take to secure approval for construction of new facilities. In addition, many of them will adversely affect the ability of providers to reach rural America, and endanger public safety communications.

Tower projects are more than time sensitive, they are *time driven* — licensees need to get coverage in a particular area *quickly* to respond to customer demands by filling “dead spots”, increasing service reliability and increasing capacity. Often new projects are motivated by the need to extend the reach of E911 and provide connectivity to first responders in areas without sufficient service. American Tower is concerned that by increasing the timeline for new projects, the regulations being contemplated: (a) may make it much costlier to build new towers or redevelop existing towers to make them more collocation friendly; and (b) will inevitably make some tower projects uneconomical. Moreover, the retroactive application of new requirements to existing towers may affect the continued viability of some towers. Such regulatory actions would not be consistent with the FCC’s statutory mandate and should be rejected.

A. Effects on the Cost and Availability of Service

1. White Strobe Lighting on New Towers and Retrofitting Existing Towers

As the Commission is well aware, white strobe lighting (especially at night) is frequently the subject of objections from neighbors on aesthetic grounds and results in zoning difficulties.³⁴ American Tower has encountered community objections to white strobes, and has worked with local governments and residents to resolve the problem. In one Vermont case, a doctor who

³⁴ Joelle L. Gehring, Ph.D., stated in her Michigan study regarding tower lighting that “there is a general public disapproval of these systems because they are more vexatious to humans than red strobes.” J.L. Gehring and P. Kerlinger, *Avian Collisions and Communications Towers: II. The Role of Federal Aviation Administration Obstruction Lighting Systems* at 15 (2007, Final) (“Michigan Lighting Report”); *see also* Comments of FWS at 18; Comments of AT&T Mobility at 14-15;

worked at night was unable to sleep *during the day* because of a white strobe flashing directly through her bedroom window. After hearing this and similar complaints from other residents, the company swung into action and developed a solution that simultaneously complied with FAA lighting requirements and allowed the community to return to their sleeping schedule.³⁵

Based on our experience with local zoning boards and communities across the United States, American Tower believes that a preference for white strobe lighting will make it far more difficult and expensive to find suitable locations for new towers and may prevent the upgrading of existing towers. Liz Hill, Director of Zoning at American Tower, describes white strobes as “anathema to local jurisdictions and residents. Many zoning ordinances prohibit white lights at night and strobe lights on towers.” Some areas may be left without service if zoning approval cannot be obtained for a tower with white strobe lighting. Similarly, American Tower’s plans to upgrade existing towers to accommodate collocations would be frustrated if white strobes were proposed to comply with the FCC’s preference and then disallowed at the local level.

The preference for white strobe lighting, in short, will have a direct and adverse effect on the cost, availability, and coverage of radio services, all of which are contrary to the FCC’s mandate. Moreover, there is evidence that white strobes may be hazardous to air navigation under some circumstances.³⁶

Some commenters have asked the FCC to apply policies adopted in this proceeding not only to *new* tower construction, but to *existing* towers, as well.³⁷ NEPA would bar such retrofit-

³⁵ American Tower was able to address the residents’ concerns by painting the tower (at considerable expense), eliminating the white strobe, and substituting a red beacon for night-time use.

³⁶ See Comments of Louisiana Mosquito Control Association at 1.

³⁷ See, e.g., Comments of American Bird Conservancy, *et al.* at 96-97.

ting³⁸ and, in any event, retrofitting would be inequitable. Requiring existing towers to be retrofitted with white strobe lighting could endanger the service provided by thousands of towers all across America, because as discussed above, white strobe lighting may be prohibited at the local level. The cost of retrofitting would be very high, and in some cases would be prohibitive, resulting in towers being decommissioned.³⁹ The inevitable result of a retrofitting mandate would be to make wireless services less responsive to public needs, less ubiquitous, and less affordable.

2. Guyed Towers

Restrictions or prohibitions concerning the use of guyed towers, likewise, will inevitably increase the cost and decrease the availability of service. Guying reduces the profile of a tower, and thus its visibility to residents in the area — a tall tower that is unguyed will be much more prominent than a guyed tower of the same height, and thus the unguyed tower may be objectionable to more residents; it may also have a greater impact on historical sites. In addition, guying may reduce the cost of building a tower of the needed size, or may give a tower the additional stability needed to support collocated antennas. Restrictions on guyed towers, thus, will increase the cost of services and decrease their availability, and may result in the construction of unguyed towers that would be more likely to adversely affect historical sites.

3. Height Restrictions

Restrictions on the use of tall towers will directly impair service and increase costs. A single tall tower cannot simply be replaced with multiple shorter towers. In some radio services,

³⁸ To the extent the FCC premises its legal authority to adopt bird-tower regulations on the theory that its tower authorizations constitute major federal actions under the National Environmental Policy Act, any federal action is complete once the authorization has been issued. NEPA does not authorize the FCC to reopen a past federal action as a basis for imposing environmental requirements. *See Norton v. South Utah Wilderness Alliance*, 542 U.S. 55, 73 (2004).

³⁹ Michigan Lighting Report at 15 (“[C]onverting communication towers with traditional lighting systems to white strobe systems can be prohibitively costly for tower companies”); *see also* Comments of Sprint Nextel at 6.

such as broadcasting, a given channel can only be used at a single location within a large area, so a tall tower may be necessary to extend coverage over the entire service area of a station or to reach areas that would be blocked by terrain obstructions. In other services, such as commercial mobile services, private land mobile, and some public safety services, multiple towers may be technically feasible, but cost-prohibitive in rural or sparsely populated areas. Moreover, there may not be suitable sites available for multiple shorter towers that would be necessary to cover the same area as a single tall guyed tower. Thus, restrictions on tower height would have the unintended effect of requiring more towers to be built within a concentrated area or the carrier would be forced to scale back its service so that it could use one tower in order to comply with the tower height restriction.

4. Location Restrictions

For similar reasons, *a priori* restrictions on placing towers in certain types of locations, such as mountains, ridges, or wetlands, should not be adopted because they would arbitrarily restrict site availability and increase the cost of service. Towers are often placed on mountains and ridges because those locations result in antennas having the best coverage due to their height above average terrain and the ability to extend signals over irregular terrain. For example, in hilly or mountainous areas, a tower located in a valley would have its signal blocked by the surrounding terrain, depriving other nearby communities of service.

Moreover, in a cellular-type network, it is typically necessary to locate a tower within a small radius of a particular location in order to provide coverage evenly over the network's grid of cells, which may require locating a tower on a ridge. Arbitrarily barring or limiting the use of particular types of terrain will result in "dead spots" in the cellular network's coverage and may deprive some communities of much needed service. For similar reasons, the policy advocated by

several bird groups of segregating towers onto “antenna farms”⁴⁰ would be antithetical to cellular network architecture and would prevent carriers from adequately and reliably meeting the communication needs of mobile telephone subscribers and public safety personnel.

5. Collocation

Rules that “promote collocation” are unnecessary and likely to be counterproductive. There are significant advantages to collocation in terms of cost, community relations, and above all, “speed to market” that already vigorously promote collocation in the marketplace. A licensee needing coverage in a given area will virtually always have strong economic incentives to collocate. By collocating on a suitable existing tower a carrier saves the time (often more than a year) and the expense (often hundreds of thousands of dollars) required to secure regulatory approvals and construct a new tower. In addition to the economic motivation, the FCC currently encourages collocation through its participation in the 2001 Collocation Agreement.⁴¹ Any rules that arbitrarily “encourage” the use of existing structures beyond existing regulatory and market-based imperatives will likely result in forcing licensees to locate their stations in less suitable or more expensive locations and will, as a result, diminish coverage and increase costs, contrary to the FCC’s statutory mandate.

6. “Routine” Environmental Processing

American Tower is concerned that several commenters call for the imposition of a new layer of environmental review involving another federal agency in the FCC’s application process. To the extent that such proposals would require FWS review or approval before towers can be constructed, these proposals can only slow down the process of siting towers. The siting

⁴⁰ See Comments of American Bird Conservancy, *et al.*, at 10-11, 105-106 (citing FWS guidelines).

⁴¹ See *Execution of Programmatic Agreement with respect to Collocating Wireless Antennas on Existing Structures*, 16 F.C.C.R. 5574 (WTB 2001), *recon. denied*, 20 F.C.C.R. 4084 (WTB 2005).

process has already been significantly slowed by the additional information and new procedures required by the 2004 National Programmatic Agreement.⁴² Adding yet another layer of regulatory “consultation,” review, or approval will further add to the delay and expense involved in the siting process. This will make it impossible for service needs to be rapidly met, discourage the provision of new services and the extension of service to new areas, as well as increase the cost of radio services, all of which is contrary to the Commission’s charter. American Tower strongly urges the Commission to reject the imposition an additional layer of bureaucratic review on licensees and tower owners, lest the siting process be reduced to a crawl.

In addition, American Tower would most strenuously object to the notion that the new paradigm of ‘routine processing’ should include an obligation for tower owners to admit researchers to their new towers. Many sites are located in extremely remote locations, without any public access. Often, the only access is via a private road with a locked gate some distance from the site, and some sites can only be reached via helicopter. There may be multiple layers of security, involving locked gates, fences, and alarms. Visitors may have to be accompanied by escorts at some sites and be subjected to prior security screenings at others.

Serious issues also arise due to avian researchers’ desire to search the area surrounding the tower, which is often not owned or leased by the tower owner.⁴³ The tower owner generally lacks authority to admit third parties to the surrounding area, which may be farmland, industrial property, school grounds, highway authority property, or land under the control of state or federal agencies. The neighboring property owners may be unwilling to allow researchers to wan-

⁴² See *Nationwide Programmatic Agreement Regarding The Section 106 National Historic Preservation Act Review Process*, WT Docket 03-128, *Report and Order*, 20 F.C.C.R. 1073 (2004), *aff’d sub nom. CTIA–The Wireless Association v. FCC*, 466 F.3d 105 (D.C. Cir. 2006).

⁴³ Avian studies, typically require that research assistants and technicians rove around the tower, transmitter sheds, and the surrounding terrain for hours at a time over an extended period.

der around their fields, their machinery, their schoolyards, or government installations for security reasons. Also, tower sites and their environs present numerous potential hazards — not only the potential electrical and RF hazards associated with radio equipment, but dangers posed by heavy equipment, livestock, wild animals, farm machinery, guard dogs, and the like which are often found on the land surrounding the site. Access to such sites for studies, especially studies involving frequent visits at variable times, would be difficult or impossible to arrange.

B. Adverse Effects on Public Safety

All of the foregoing adverse effects apply equally to both commercial services and public safety services. In addition, there are some significant additional considerations regarding how tower regulations may uniquely affect public safety services.

Requiring avian studies at new towers as part of the “routine” environmental processing may have significant adverse effects on public safety. Numerous current American Tower sites have public safety organizations or government agencies as tenants, and future sites are likely to be used by such agencies as well. Many sites that are used for public safety services are subject to significant security restrictions imposed by state and federal agencies. Public safety organizations and government agencies have legitimate reasons for securing access to essential facilities so as to protect transmitters and antennas from intentional or unintentional damage. Giving researchers open access to such sites would be highly problematic.

Given these issues, American Tower would strongly oppose the imposition of a requirement that all sites be made available to researchers. Rather, research should be permitted at a tower only if the tower owner and the researcher can mutually agree to key terms such as the duration of the research, the areas to which the researchers can have access, liability, insurance, and security.

C. Adverse Effects on Rural Areas

The greatest impact of the proposed regulations would likely be in rural areas.⁴⁴ Tall towers and guyed towers are often necessary to provide coverage over wide areas having sparse, widely-distributed populations. Likewise, tall or guyed towers are frequently necessary in remote locations, or those with high winds, such as mountaintops, ridges, and shorelines, and to provide public safety organizations with coverage of unpopulated areas to address emergency situations such as avalanches, forest fires, or tornadoes. Restricting the availability of sites through arbitrary rules may diminish the availability of both commercial services (broadcasting, mobile telephone, and private dispatch) and public safety services across a broad swath of rural America.

Regulations that would restrict tower type/height/locations, impose arbitrary lighting requirements, or require costly environmental processing will result in rural areas not receiving service, slow down the rate at which rural areas are built out, and raise the cost of serving rural areas.⁴⁵ This would be contrary to the FCC's mandate to *promote* the use of radio to facilitate

⁴⁴ See Comments of M. Michael Rounds, Governor of South Dakota, at 1 (“For build-out in South Dakota’s underserved rural areas to take place, it will likely be necessary for towers to be taller than 200 feet for the optimum benefit of the end users, as well as for the wireless provider erecting the tower.”); Comments of the South Dakota Public Utilities Commission at 1-2 (“More than half of South Dakota’s population resides outside the state’s two Metropolitan Statistical Areas The availability of wireless communications is necessary to preserve the safety and facilitate emergency response for the South Dakotans and visitors traveling our roadways.”).

⁴⁵ See Comments of South Dakota Public Utilities Commission at 2 (“If restrictions on taller towers are adopted, these restrictions would have a negative impact on South Dakota. . . . Understanding the considerable investment a wireless provider makes when constructing a new tower, it is unlikely the provider would be willing to place three times the number of shorter towers in South Dakota when one taller tower would provide the same service. . . . [P]roviders would erect fewer towers in South Dakota and the state’s economic development, public safety and quality of life would suffer.”); *id.* (“[B]ecause South Dakota is ranked as the fourth windiest state in the nation, taller towers built in rural areas will require guy wires.”); Comments of South Dakota Bureau of Information and Telecommunication at 2 (“The financial impact to the State of South Dakota to retrofit [the state’s 40 red-lighted] towers with a strobe-type lighting system would be considerable, as none of the current lighting system is compatible. There will also be

(footnote continued)

communications at a reasonable cost “Nation-wide” and promote the expansion of services in rural areas.⁴⁶

CONCLUSION

For the reasons stated, the FCC should terminate this proceeding without adopting any new rules, policies, or preferences as there is no body of peer-reviewed data which warrants taking any action nor is there a legal basis for doing so. The FCC must exercise whatever limited authority it has to address avian mortality in a way that serves the purposes of the Communications Act, rather than acting contrary to its statutory mandate.

Respectfully submitted,

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(footnote continued)

higher maintenance costs associated with having active components on the tower as opposed to having all active components in the shelter.”).

⁴⁶ 47 U.S.C. § 151.